

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

**ATTORNEY GENERAL OF THE
STATE OF OKLAHOMA, et al,**

Plaintiff,

v.

Case Number: 05-CV-329-TCK-SAJ

TYSON FOODS, INC., et al,

Defendants,

TYSON FOODS, INC., et al,

Third-Party Plaintiffs,

v.

CITY OF TALEQUAH, et al ,

Third-Party Defendants.

**THE BERRY GROUP’S REPLY TO THE RESPONSE OF THIRD-PARTY
PLAINTIFFS TO THE BERRY GROUP’S MOTION TO DISMISS, AND
ALTERNATIVELY FOR SEVERANCE AND STAY, OF THE THIRD-PARTY
COMPLAINT OF DEFENDANTS/THIRD-PARTY PLAINTIFFS, TYSON FOODS, INC.,
TYSON CHICKEN, INC., COBB-VANTRESS, INC., PETERSON FARMS, INC.,
SIMMONS FOODS, INC., GEORGE’S, INC., AND WILLOW BROOK FOODS, INC.**

Introduction

The Berry Group has joined in the motion to dismiss and to sever and stay the third party complaints of the defendants. In addition, the motion and brief of the Berry Group have raised additional issues unique to its status as third party defendants. The defendants/third party plaintiffs, Tyson Foods, Inc., Tyson Chicken, Inc., Cobb-Vantress, Inc., Peterson Farms, Inc., Simmons Foods, Inc., George’s Inc., and Willow Brook Foods, Inc. (“Tyson Defendants”), have filed their response to the Berry Group’s motion. The Berry Group submits this reply to that response pursuant to LCvR 7.2 (h).

ARGUMENTS AND AUTHORITIES

The Restatement (Third) of Torts: Apportionment Of Liability Conflicts with Oklahoma Law

The Tyson Defendants assert the Restatement (Third) of Torts: Apportionment of Liability does not prohibit contribution by intentional tortfeasors.¹ Regardless of whether the new Restatement's treatment of intentional tortfeasors has changed, Oklahoma law specifically prohibits contribution by an intentional tortfeasor. The contribution provision of Oklahoma Statutes specifically provides: "There is no right of contribution in favor of any tort-feasor who has intentionally caused or contributed to the injury or wrongful death."² The case of *Conoco, Inc. v. ONEOK, Inc.*, 91 F.3d 1405 (10th Cir. 1996), cited by the Tyson Defendants does not address the issue of contribution in favor by an intentional tortfeasor. As noted by the Tyson Defendants, *Conoco* involved an action by a private landowner for damages due to the rupture of Conoco's petroleum pipeline which resulted in damages to the land and groundwater. Prior to the action, the State of Oklahoma had ordered Conoco to remediate the site. In the action by the landowner, Conoco asserted in a third party action that ONEOK caused the leak and sought contribution. The jury found Conoco and ONEOK equally liable for the damages paid to the landowner by Conoco in settlement of that action. However, the district court held that the remediation costs would be submitted under an unjust enrichment theory and not contribution. The 10th Circuit held that clean up costs, like the property damages of the landowner, should have been submitted to the jury under Conoco's contribution claim. Since the jury had found Conoco and ONEOK equally liable, ONEOK was held liable for one half of the remediation.

¹ See, Tyson Defendants' Response to The Berry Group's motion to dismiss or, alternatively, to sever and stay, Document Number 775 at pages 8-9.

² 12 O.S. § 832 C.

Conoco did not involve the issue of whether an intentional tortfeasor is entitled to contribution. In fact, the Court discussed *Conoco*'s entitlement to contribution under 12 O.S. § 832. Subsection C, had it been applicable or raised, would have barred contribution since it was in effect at the time of the damage and subsequent action.³ It is obvious that the claims against ONEOK sounded in negligence. *Conoco*'s theory of liability was that ONEOK through another party had installed its petroleum pipeline on top of *Conoco*'s pipeline. *Conoco* alleged and the jury apparently believed that the *Conoco* pipeline was dented during the installation of the ONEOK pipeline and that was the cause of the rupture. The facts do not support the conclusion that ONEOK's actions were intentional in the sense that the company it engaged to install the pipeline intended to damage the *Conoco* pipeline and thereby cause its rupture. In the matter before this Court, the State of Oklahoma has alleged that the pollution of the Illinois Watershed by the Tyson Defendants was intentional.⁴

The Assertion of Lack of Jurisdiction Over Arkansas Entities is Incorrect

The Berry Group, as well as the State of Oklahoma, has noted that the Tyson Defendants have not named any Arkansas entities as third party defendants. Tyson Defendants respond that they do not believe that this Court has jurisdiction over these out of state residents and businesses.⁵ The existence of the State's action against the Tyson Defendants for their out of state activities that resulted in the pollution of an Oklahoma river is sufficient for the assertion of in personam jurisdiction. Some of the Tyson Defendants were also defendants in the action brought in this Court by the City of Tulsa. It does not appear that the alleged lack of in

³ 12 O.S. § 832 was originally enacted in 1978, the Historical and Statutory Notes found in West's Oklahoma Statutes Annotated, notes that the amendment in 1980 added subsections G and H and the only other amendment, in 1990, revised a portion of the subsection H.

⁴ See, e.g., Plaintiff's motion to sever and stay or to strike or dismiss the third party complaints of the Defendants, Document Number 247, at pages 21-22 and Plaintiff's reply to the Tyson Defendants' response to the Plaintiff's motion, Document Number 584 at page 4.

⁵ Page 10 of Tyson's response, Document Number 775.

personam jurisdiction was raised by those Defendants.⁶

If the jurisdictional concerns raised by the Tyson Defendants relate to subject matter jurisdiction, the concept of ancillary jurisdiction would allow the Court to entertain those claims. *See, King Fisher Marine v. 21st Phoenix Corporation*, 893 F.2d 1155, *cert denied*, in *Langan Engineering Associates, Inc. v. 21st Phoenix Corp.*, 496 U.S. 912 (1990) (“It is well settled, however, that a court has ancillary jurisdiction of a defendant's proper rule 14(a) claim against a third-party defendant without regard to whether there is an independent basis of jurisdiction (e.g., diversity between the third-party litigants), so long as the court has jurisdiction of the main claim between the original parties”) (citations omitted).⁷

The Berry Group is not suggesting that this litigation needs additional third parties. It offers this argument to refute the reason given by the Tyson Defendants for the absence of Arkansas entities as third party defendants in this litigation.

The Tyson Defendants Have Not Responded to the Berry Group's Contention That Judicial Efficiency is Not Promoted Because Only a Selective Group Are Named as Third Party Defendants

The Tyson Defendants submitted that the third party complaint will eliminate the need for multiple trials. This argument may have credence but for the fact that only a relatively select few Oklahoma individuals and entities have been named as third party defendants in this litigation. The Tyson Defendants, in their response to the Berry Group's motion assert that “hundreds of persons and entities” are responsible for the release of phosphorous and other

⁶ *See*, *City of Tulsa v Tyson Foods, et al.*, Northern District of Oklahoma case number 01-CV-900.

⁷ *See also*, *United of Omaha Life Insurance Co. v Reed*, 649 F.Supp. 837 (D. Kan. 1986), “It is well established that a defendant's claim against a third party defendant is within the ancillary jurisdiction of the federal courts. This doctrine recognizes the power of a federal court, once proper subject matter jurisdiction of the main claim has been established, to hear a claim arising out of the same transaction or occurrence asserted by the defendant against a non-diverse impleaded third party defendant.” (citation omitted).

materials into the Illinois River Watershed.⁸ In its amended third party complaint, Tyson Defendants assert that their contribution to the condition of the IRW is “insignificant in comparison to the contribution of the Third-Party Defendants and the thousands of other persons, corporations and political subdivisions operating with the IRW.”⁹ They assert that all individuals and entities responsible for the condition of the watershed must be included to avoid multiple trials and actions. The Berry Group challenged the assertion that the addition of the named third party defendants will promote judicial economy by avoiding multiple trials since the Tyson Defendants did not name all persons and entities whose activities may directly affect the watershed.¹⁰ The Tyson Defendants do not answer the assertion of the Berry Group that absent the inclusion of those allegedly responsible for the condition of the watershed, the third party complaint does not promote efficiency or economy.

Conclusion

The failure of the Tyson Defendants to include all of the individuals and entities, including those in Arkansas, defeats their claim that the third party action will eliminate the need for multiple lawsuits and trials. The Berry Group has not abandoned the motion to dismiss or sever and stay the third party complaints by submitting that this Court has personal and subject matter jurisdiction over those entities and individuals in Arkansas that are allegedly responsible for pollution of the Illinois River. The Berry Group does not believe that the addition of thousands of third party defendants will advance the cause of judicial economy or efficiency or resolution of the controversy. Rather, the lack of all alleged responsible parties is noted to refute the Tyson Defendants’ contention that it could not name Arkansas citizens in the third party

⁸ Document 775 at page 26

⁹ Third Party Complaint, Docket Number 80-1, page 10, ¶ 3

¹⁰ Berry Group’s motion to dismiss or sever, Document Number 589 at pages 6-7.

complaint and that their third party action, despite such absence, creates a forum for resolution of all issues at one time. This is simply not correct. The third party complaint has inflated the initial litigation beyond recognition without serving a legitimate interest of the parties or the Court. For these reasons, the Berry Group requests that the motion to dismiss or sever and stay be sustained.

Respectfully submitted,

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(Signed by filing attorney with permission of Mr. DesBarres)

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of June 2006, I electronically transmitted a copy of the Berry Group's Reply to the Response of the Third Party Plaintiffs to the Berry Group's Motion to Dismiss, and Alternatively for Severance and Stay of the Third Party Complaint of Defendants/Third Party Plaintiffs, Tyson Foods, Inc., Tyson Chicken, Inc., Cobb-Vantress, Inc., Peterson Farms, Inc., Simmons Foods, Inc., George's Inc. and Willow Brook Foods, Inc. to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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